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Due Process, Community, and the Prince in the Evolution of the Ordo Iudiciarius

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Ad conservandam memoriam
tantae benevolentiae
Alessandro Giuliani

Medieval conceptions of authority and power were intimately connected with judicial procedure. In the early Middle Ages, disputes were settled by ordeals and by rudimentary court procedures based on written and oral evidence[1]. Customary usages regulated court procedure, not written jurisprudential norms. In "An Age without Jurists", to use Manlio Bellomo's happy turn of phrase, the rules of procedure were often uncertain and tentative in difficult cases[2]. Although we do not have a written body of norms for early medieval procedure, we can learn much about judicial practices in court from literature. Literary sources give us intriguing bits and pieces of evidence that before the thirteenth century, the prince was not at the center of a trial. Rather, the community under his lordship gathered around him in court, dictating the course of a trial and determining its outcome. Charlemagne's pusillanimous role at the trial of Ganelon in the *Song of Roland* or King Arthur's helplessness when Guinevere was accused of poisoning a knight with an apple in the *Death of King Arthur* highlight the purely mediatory role of the prince in the judicial process and spark intriguing questions about how medieval

* This essay is based on my book, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley-Los Angeles-London, University of California Press, 1993). This essay is dedicated to the memory of Alessandro Giuliani who had asked me to write it for a book that he and Nicola Picardi were editing. He thought that an up-date and summary of the book would be useful for legal historians.

[1] See, for example, the evidence presented in *The Settlement of Disputes in Early Medieval Europe*, edited by W. Davies and P. Fouracre (Cambridge 1986).

[2] *L'Europa del diritto comune* (Roma[6] 1989) 45, "Un'età senza giuristi".

audiences understood these court scenes and the king's role in them[3].

Whatever the lay audience's response to these vivid courtroom dramas might have been, with the emergence of a system of procedure based on the rules and norms of Roman law, the role of authority in medieval courts changed dramatically. Princes left the periphery of the judicial system and took their place at the center of it. Justice in the early Middle Ages had been a community affair, but as first ecclesiastical courts and then secular courts adopted the new rules, which the jurists called the *ordo iudiciarius*, princes in both spheres discovered a new and powerful instrument of governance when they exercised their authority as judge[4].

Kings, princes, and city-states extended the authority of their judicial institutions into every nook and cranny of society during the twelfth and thirteenth centuries. This development is most noticeable in Norman-French lands during the reigns of Henry I and Henry II and in the Italian city-states during the twelfth century, but during the thirteenth century, centralized legal institutions became pervasive throughout Western Europe. As the jurists began to create a jurisprudence describing the *ordo iudiciarius*, they juxtaposed the prince's fullness of power (*plenitudo potestatis*) or his absolute power (*potestas absoluta*) to his right to subvert the judicial process. In twelfth-century law – and even before – the jurists had formulated norms that regulated the proper role of the prince as judge, but these norms were not beyond the reach of the prince's arbitrary power. During the thirteenth century, they radically changed the theoretical foundations of judicial procedure by taking the rules governing procedure out of the realm of positive law and putting them in the law of nature. The result of this shift was a significant limitation on the prince's authority. Since fundamental procedural norms were a part of natural law, the prince could not take these rights away from his subjects[5].

[3] P. Hyams, 'Henry II and Ganelon', *The Syracuse Scholar* 4 (1983) 23-35.

[4] A short sketch of these developments can be found in K. Pennington, 'Law, Procedure of, 1000-1500', *The Dictionary of the Middle Ages* 7 (New York 1986) 502-506.

[5] I stress the points in this paragraph because at least one scholar has misunderstood the main argument of my book completely. In a review appearing in the *Rivista storica italiana* 107 (1995) 876-878, Sergio Bertelli concluded that it was primarily concerned with sovereignty and does not even mention its central

Before we look at these developments, I must say something about the Anglo-American legal term "due process" that I have incorporated into the title of my essay. Although the phrase cannot be translated elegantly into any other European language, the concept of due process is a part of every European legal system. A jurist of the *Ius commune* would not have recognized the term, although, as we shall see, they would have certainly understood the idea. A modern definition of the term is "<the> course of legal proceedings established by the legal system... to protect individual rights"[6]. Although it may be anachronistic to apply the term to medieval legal systems – even if it is a medieval coinage, making its first appearance in fourteenth-century English royal statutes, written in French[7] – I shall use the term to describe the medieval jurist's treatment of issues that are an important part of common-law's assumptions about due process: the right of a litigant to be summoned, to testify, and to present evidence in court. In order to understand the development of medieval ideas of due process, we must sketch the evolution of medieval procedure in ecclesiastical courts and in the inchoate *Ius commune* of the twelfth century.

1. *The Establishment of the* Ordo Iudiciarius *in Twelfth-Century Ecclesiastical Courts*

The history of how the Romano-canonical process, the *ordo iudiciarius*, became the model for the courts of continental legal systems remains to be written. We can say that its roots predate the Fourth Lateran Council which forbade clerical participation in the ordeal. From at least 1150 on, when the evidence becomes plentiful, church

argument: the development of procedural norms. Bertelli writes that the story of the Pazzi Conspiracy fits "incongruamente" into the book (p. 878). If he had understood that the creation of procedural norms in the *Ius commune* was its central theme, then he might have seen that the *consilia* written in defense of Lorenzo de' Medici summed up two centuries of juristic thought on norms of procedure and were important vehicles for transmitting those ideas into early modern jurisprudence.

[6] To quote one dictionary's definition; *Webster's New World Dictionary of the American Language* (2nd College Edition; 1978).

[7] The earliest use of the term is in a statute of Edward III, 28 Edward III, c.3 (1354): "saunz estre mesne en respons par due process de lei".

courts all over Europe had almost completely abandoned the ordeal as a mode of proof for deciding ecclesiastical cases. This fact is attested by the vast number of twelfth-century papal decretals that describe implicitly and sometimes explicitly the procedures of the *ordo iudiciarius* that were, by then, well established[8].

The centralization of papal legislative and judicial power in the eleventh century had introduced far-reaching changes in how ecclesiastical justice functioned. The *Dictatus papae* of Pope Gregory VII stipulated that "no one shall dare to condemn one who appeals to the apostolic chair" (no. 20). Appeal from the decision of an ordeal – the judgment of God – was logically impossible. The inexorable logic of the pope's dictum demanded that the old systems of proof not be used. As the papal court became the court of last resort, ecclesiastical procedure had to adapt to a system of proof that was based on evidence. Papal letters of the twelfth century pullulate with references to witnesses and their testimony. The jurists helped to clarify the principles of the new procedure. Sometime before 1141, Bulgarus, the famous doctor of Roman law, wrote a short *ordo* that summarized the rules of procedure for Haimeric, the papal chancellor[9].

We are not well-informed about the evolution of secular procedure of the twelfth century under the influence of the new jurisprudence of the *Ius commune*. Some secular courts, especially in Southern Europe, seem to have adopted the rules of the *ordo iudiciarius* before the courts in Northern Europe. But since the cases were oral and were not recorded, we cannot follow the story of how the rules and assumptions of the new system may have conflicted with those of the old. One source, papal letters, provides a window, albeit a very small one, into twelfth-century courtrooms and a glimpse of the new practices and rules supplanting customary procedural norms.

Although the term, *ordo iudiciarius*, dates back to the early Middle Ages[10], from about the middle of the twelfth century it was used to describe the new procedure of Romano-canonical process in

[8] See *Prince and the Law* 135-142.

[9] L. Fowler-Magerl, *Ordo iudiciorum vel ordo iudiciarius* (Repertorien zur Frühzeit der gelehrten Rechte, Ius commune, Sonderhefte 19; Frankfurt am Main 1984) 35-40.

[10] Fowler-Magerl, *Ordo iudiciorum* 10-11.

ecclesiastical letters[11]. Litigants and institutions obtained letters from the papacy guaranteeing that their cases would be heard according to the *ordo iudiciarius*, a clear indication that they wished to protect themselves from other forms of proof, the ordeal or other forms of procedure that violated the principles of the *ordo iudiciarius*[12].

If one judges from the extant papal letters of the twelfth century, the pontificate of Alexander III was of crucial importance for this development. For example, Alexander granted the abbey of Holcultram the right to have disputes involving its possessions heard before the bishops of Glasgow and Whithorn according to the *ordo iudiciarius*. On no account, he ordered, should these cases be heard in secular forum or in secular courts[13]. He also ordered the archbishops, bishops, and archdeacons who exercised jurisdiction where houses of the order of Sempringham were situated not to permit laymen to disturb them "outside the 'ordo iuris'"[14]. One cannot always discover what facts lie behind a papal mandate, but when Alexander prohibited the abbot and monks of Clairmarais from disturbing the rights of another monastery "outside the 'ordo iuris'", because their actions would injure their religious vocation, we may, perhaps, presume that the abbot was using customary secular law to

[11] E.g. *Papsturkunden in Frankreich*. VII. *Nördliche Ile-de-France und Vermandois*, ed. D. Lohrmann (Abhandlungen der Akademie der Wissenschaften in Göttingen, Phil.-Historische Klasse, 95; Göttingen 1976) no. 162 (1173-74), no. 237 (1165-81), no. 322a (1192); Pope Innocent II ordered the abbot of St. Augustine's in Canterbury to expel disobedient monks by using the "ordo iudiciarius", *Papsturkunden in England*. I. *Bibliotheken und Archive in London*, ed. W. Holtzmann (Abhandlungen der Akademie der Wissenschaften in Göttingen, phil.-historische Klasse 25; Berlin 1931), no. 23 (1141), p. 248.

[12] See the examples published by C. Duggan and S. Chodorow in *Decretales ineditae saeculi XII, from the Papers of Walther Holtzmann* (MIC, Series B, 4; Città del Vaticano 1982) 137: "nec eum super eadem molestari sine ordine iudiciario permittatis". Other examples in letters 17 (p. 31), 35 (p. 58), 46 (p. 81), 65 (p. 112).

[13] *Scotia pontificia. Papal Letters to Scotland before the Pontificate of Innocent III*, ed. R. Somerville (Oxford 1982) no. 98, p. 94-95: "Verum si qui adversus illos super hiis agere forte voluerint, sub examine vestro secum exinde iudiciario ordine experiantur, nec eos super aliquibus possessionibus suis sibi aut monasterio suo pia devotione collatis extra curiam ecclesiasticam ad seculare forum aliqua ratione trahi permittatis aut eius iudicium quoquo modo subire." The date of this letter is 1175-1181.

[14] *Papsturkunden in England*, ed. Holtzmann, I, no. 185 (1159-81), p. 455: "ne canonicos aut moniales... a quolibet contra iuris ordinem fatigari".

claim his rights[15]. This interpretation of the letter is reinforced by Alexander's conclusion that if the monks wished to litigate, they should do so before an elected judge and according to the *ordo iudiciarius*[16].

Sometimes a papal letter is explicit enough to allow a brief glimpse of the struggle between the rules of the new *ordo* and the customary law of proof and contract. An English example described in two letters of Alexander III illuminates the situation in the late 1160's. In the first Alexander mandated that Roger, the archbishop of York, and Hugo, the bishop of Durham, should not permit laymen in their dioceses to obtain possession of the lands of the abbey of Rievaulx (Helmsley, Yorkshire) through the secular courts. Their parishioners were accustomed to occupy the abbey's lands "by whatever means" and then to vindicate their rights to the property by means of "a certain customary contract that they call gage" in a secular court. Consequently, the abbot and the monks frequently were unjustly despoiled of their property without the benefit of the *ordo iudiciarius*[17]. In a second letter to the same recipients Alexander issued a general mandate that all cases involving the abbey's possessions should be heard in ecclesiastical courts according to the *ordo iudiciarius*[18]. The formula of prohibition in the dispository section of the letter is exactly the same as that of the abbey of Holcultram, but in this case we are informed, if only sketchily, about

[15] *Papsturkunden in Frankreich*. III. *Artois*, ed. J. Ramackers (Abhandlungen der Gesellschaft der Wissenschaften zu Göttingen, 23; Göttingen: 1940) no. 63 (1173), p. 123: "quatinus iura et possessiones... eis in pace et quiete dimittatis nec... per uos aut per alios indebite molestare aut quolibet modo uexare contra iuris ordinem presumatis. Si enim eos exinde minus rationabiliter grauare presumpseritis, religionem uestram plurimum dedecebit".

[16] Ibid.: "Ceterum si aduersus iamdictos abbatem et fratres de iustitia uestra confidentes agere uolueritis, coram iudice ab utraque parte communiter electo ordine iudiciario experiamini".

[17] *Papsturkunden in England*, ed. Holtzmann, I, no. 105, p. 370 (1167-69): "Ad aures nostras peruenisse noscatis, quod cum aliqui parrochiani uestri sibi quamlibet possessionem abbatis et fratrum de Rieualle uendicare uoluerint, eam quoquo modo occupare consueuerunt et deinde, postquam ipsam qualitercumque intrauerint, se ius suum sicut mos est seculari curia euicturos sub cuiusdam consuetudinis obligatione quam guagium uocant soliti sunt offerre, unde frequenter contingit, quod iamdicti abbas et fratres suis possessionibus iniuste et absque ordine iudiciario spoliantur".

[18] Ibid. no. 107, p. 371.

the background of the complaint[19]. If we knew more about English procedure and law of gage at this time, we could better understand the situation at Rievaulx[20]. We would like to know how the monks were despoiled of their rights, of which rights they were despoiled, and what procedural devices were used. But whatever the case, ecclesiastics found their own system of justice more equitable than the system offered by secular law, and they appealed to Rome for help when their right to litigate according to the norms of the *ordo iudiciarius* was violated. The wishes of the papal curia and the local clergy were in harmony; otherwise the new system of procedure would have floundered. The increasingly frequent use of the technical term, *ordo iudiciarius*, in papal letters of the late twelfth century undoubtedly forbids violent dispossession, but also dispossession by procedures other than the Romano-canonical process[21].

The new procedure took root slowly in some parts of Europe. Although jurists produced scores of treatises that described the rules and procedures of the *ordo iudiciarius* during the twelfth century, local customs were resistant to change. Or if customary law incorporated the new norms of procedure, people still resisted changes in procedure. Two letters of Pope Innocent III illustrate these points. A certain layman and his brothers from Spoleto, then under the secular jurisdiction of the pope, appealed to the papal curia in 1203 for justice. They had been accused of theft and had been forced, contrary to the customs of the land, to submit to a duel to prove their innocence. Unfortunately, they lost. The consuls of Spoleto confiscated their property even though the brothers had appealed to the pope. The true thieves were, however, discovered, and the brothers were vindicated. Innocent wrote to the consuls that they must return the

[19] See the text printed above in n. 14.

[20] On gage see F. Pollock and F. Maitland, *The History of English Law before the Time of Edward I*, ed. S.F.C. Milsom (2 vols. Cambridge 1968) II 117-24.

[21] The language used in papal letters to forbid non-judicial or violent dispossession is quite different. A typical formula is: "Nulli ergo hominum liceat predictum locum temere perturbare aut eius possessiones auferre vel ablatas retinere, minuere seu quibuscumque vexationibus fatigare". Printed by O. Hageneder and A. Haidacher, *Die Register Innocenz' III.*, I: 1. *Pontifikatsjahr: Texte* (Graz-Köln: 1964) xlix. This formula had been used in papal privileges much earlier: e.g. *Papsturkunden in England*, ed. Holtzmann, no. 10 (1120), p. 232; *Papsturkunden in Frankreich*, ed. Lohrmann, no. 62 (1147), pp. 320-21. Very often the entire clause is abbreviated to "'Decernimus ergo,' etc." e.g. Ibid. no. 61, 63, 64, 67.

brothers' goods[22]. One can conclude from these facts that, by the early thirteenth century, customary law no longer endorsed the older modes of proof in Spoleto, but some people, perhaps even the consuls of Spoleto, clinging to old ways, still believed in their efficacy and their power to determine the truth. When Vincentius Hispanus commented on this decretal a decade later, just before the Fourth Lateran Council forbade clerical participation in the ordeal, he observed that the duel "was not congruent with the custom <of Spoleto> or with the ius commune... athletes do not have a place <in court> according to Roman law"[23]. Vincentius and many courts in Southern Europe may have long rejected the older modes of proof, but pockets of resistance to the *ordo iudiciarius* remained[24].

The example from Spoleto reflected practice in the secular sphere. Another letter from Innocent's register demonstrates that customary usages contrary to the *ordo iudiciarius* in ecclesiastical courts were also difficult to eliminate. In a letter from the first year of his pontificate (1199), Innocent III ordered Wolfger, the bishop of Passau, not to consult the community when deciding ecclesiastical cases. Local custom, it seems, permitted the bishop to use "literate and illiterate, knowledgeable and ignorant," men to hear the evidence presented in the episcopal court and to render decisions[25]. The letter does not indicate whether the men were clerical or lay. From what we

[22] O. Hageneder, J.C. Moore, and A. Sommerlechner, *Die Register Innocenz' III.*, VI: 6. *Pontifikatsjahr, 1203/1204: Texte und Indices* (Wien 1995), no. 26, p. 40.

[23] Vincentius Hispanus to 3 Comp. 5.18.1 (X.5.35.2) v. *consuetudinem* (St. Gall, Stiftsbibl. 697, fol. 132r): "unde eorum factum nullum habuit colorem excusationis cum nec consuetudini consonet ut hic nec iuri communi... et athelete non habent locum secundum leges".

[24] On the slow penetration of the *ordo iudiciarius* into ecclesiastical courts north of the Alps, see O. Hageneder, *Die geistliche Gerichtsbarkeit in Ober- und Niederösterreich von den Anfängen bis zum Beginn des 15. Jahrhunderts* (Forschungen zur Geschichte Oberösterreichs, 10; Graz-Wien-Köln 1967) Chapter 1-4.

[25] Hageneder and Haidacher, *Die Register Innocenz' III.* No. 565 (571), p. 824: "quod in tua diocesi etiam in causis ecclesiasticis consuetudo minus rationabilis habeatur, quod cum aliqua causa tractatur ibidem, allegationibus et querelis utriusque partis auditis a presentibus, litteratis et illitteratis, sapientibus et insipientibus, quid iuris sit queritur, et quod illi dictaverint vel aliquis eorum presentium consilio requisito, pro sententia teneatur". The decretal was included in 3 Comp. 1.3.2 (X.1.4.3). See the discussion of this text in Hageneder, *Die geistliche Gerichtsbarkeit* 15-16, nn. 45-48.

know about the function of ecclesiastical courts and synods during the twelfth century, they were probably a mixed group containing both. These men may have been "iurati" of Germanic customary law.

These men, fumed Innocent, rendered judgments in ecclesiastical cases and even their counsel (*consilium*) was accepted as a judgment. This procedure, he continued, was an "irrational" custom because it obviates canon law and renders judgments on defendants by judges "who were not their own". This argument is clever and revealing. Innocent conceived of the episcopal court and the diocese as being under the jurisdiction of the bishop alone. Just as the pope was the ordinary judge of the entire church, the bishop was the ordinary judge of his diocese, and only he could render judicial decisions for those who were subject to him. A group of laymen and clerics did not represent the corporate church, only the bishop did. Innocent admonished Wolfger that "he should deliver judgments for his subjects after having considered the issues of the cases, as the *ordo* of reason demands"[26]. As this letter illustrates, a revolution in the attitudes of the aristocracy towards its role in rendering justice had taken place since the eleventh century in Southern Europe. Innocent and the lawyers in the papal curia scorned the community, the "vox populi," as a participant in the judicial process, consciously striving to take papal law and procedure out of the hands of the community and placing it squarely under the authority of the ecclesiastical prince[27]. In England the story ended differently in the secular courts. Those "illiterate and ignorant" men, the jury, never relinquished their place in the courtroom and remain there today.

2. *The Jurisprudence of the* ordo iudiciarius

In the twelfth century, the *ordo iudiciarius* was new and dangerous to local interests, usurping the authority of the community to render justice. The new procedure would not have been victorious if

[26] Ibid.: "Nos igitur attendentes quod consuetudo que canonicis obviat institutis, nullius debeat esse momenti, cum sententia a non suo iudice lata nullam obtineat firmitatem, ut in causis ecclesiasticis subiectorum tuorum, postquam tibi de meritis earum constiterit, sententiam proferre valeas, sicut ordo postulat rationis".

[27] See the remarks of R.C. van Caenegem, *The Birth of English Common Law* (Cambridge 1973) 71, with note 26.

it had not offered better justice than the old system. By the second half of the twelfth century, criticism of one form of local justice, the ordeal, was prevalent and persuasive[28]. As the *ordo* was established as the sole, legitimate mode of proof in ecclesiastical tribunals, the jurists in the schools needed to justify its substitution for other modes of proof. Although they might have pointed to its use by the ancient Romans, they preferred to cite biblical examples. Their reliance on the Bible is another example of its importance for the jurisprudence of the *Ius commune*[29].

The jurists found their inspiration in the Old Testament and ingeniously traced the origins of the *ordo iudiciarius* to God's judgment of Adam and Eve in paradise. By doing so, they created a powerful myth justifying the *ordo* that retained its explanatory force until the sixteenth century.

Around 1150 Paucapalea was the first canonist to connect the form of procedure used in ecclesiastical courts with a biblical model. The Bible provided evidence of the *ordo iudiciarius*'s antiquity and its legitimacy. He noted that the *ordo* originated in paradise when Adam pleaded innocent to the Lord's accusation. When Adam complained to God that: "My wife, whom You gave to me, gave [the apple] to me, and I ate it," he responded to God's summons, "Adam ubi es?" "Adam, where are you?"[30]. Although Paucapalea may not have been aware of the implications of Adam's cheeky reply to God, Adam came dangerously close to accusing the Lord of entrapment, a term in Anglo-American law used to describe a situation in which a government agent induces a person to commit a crime. If the Lord realized that Adam's reply was subversive and perhaps even blasphemous, he overlooked it.

Paucapalea's main point was subtle and would not be lost on later jurists: even though God is omniscient, He too must summon

[28] The classic study of this criticism is J. Baldwin, 'The Intellectual Preparation for the Canon of 1215 against Ordeals', *Speculum* 36 (1961) 613-636.

[29] On the importance of the Bible for juristic thought, see the remarks of J. Gaudemet, *Les naissances du droit: Le temps, le pouvoir et la science au service du droit* (Domat droit public; Paris 1997) 7-9; and E. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Thought* (Princeton 1957) 116-122; and W. Ullmann's fundamental study in 'The Bible and Principles of Government in the Middle Ages', *Settimane di studio del Centro Italiano di Studi sull'Alto Medioevo* 10 (Spoleto 1963) 183-227.

[30] Genesis 3.12.

defendants and hear their pleas. Besides the text from Genesis, Paucapalea cited a passage from Deuteronomy in which Moses decreed that the truth could be found in the testimony of two or three witnesses. Since the rules of the *ordo iudiciarius* also required two or more witnesses, Deuteronomy was further proof of the procedure's antiquity[31]. Two principles emerge from this gloss that do not enter English common law until centuries later. The first is that every accusation requires at least two witnesses to the crime; the second that defendants have the right to testify in their own defense.

A few years later (ca. 1165) Stephen of Tournai further dissected the "trial" of Adam and Eve finding even more evidence that this event marked the beginning of the *ordo iudiciarius*. He pointed out that each part of the story conformed to the stages of a trial in the *ordo* and labeled each part with the appropriate technical term. He noted that Adam raised, as it were, a formal objection (exceptio), to the Lord God's complaint (actio) and shifted the blame to his wife or to the serpent[32]. "Exceptio" and "actio" were technical terms taken from Roman law that had already become essential parts of the *ordo iudiciarius*[33]. Stephen was the first jurist to define the *ordo iudiciarius*[34]:

[31] Paucapalea, Prologue to *Summa*, ed. Johann F. von Schulte (Giessen 1890; repr. Aalen 1965) 1: "Quoniam in omnibus rebus animadvertitur, id esse perfectum, quod his omnibus ex partibus constat, exordium vero cuiusque rei potentissima pars est, ideoque mihi videtur, agendarum causarum formam ecclesiastici iuris originem eiusque processum non esse inutile ignorantibus reserare... Placitandi forma in paradiso primum videtur inventa, dum prothoplastus de inobedientiae crimine ibidem a domino interrogatus criminis relatione sive remotione usus culpam in coniugem removisse autumat dicens, 'mulier, quam dedisti, dedit mihi et comedi' (Genesis 3.12). Deinde in veteri lege nobis tradita, dum Moyses in lege sua ait: 'In ore duorum vel trium testium stabit omne verbum' (Deut. 19.15)".

[32] Stephen of Tournai, Prologue to *Summa*, printed by H. Kalb, *Studien zur Summa Stephans von Tournai: Ein Beitrag zur kanonistischen Wissenshaftsgeschichte des späten 12. Jahrhunderts* (Forschungen zur Rechts- und Kulturgeschichte, 12; Innsbruck 1983) 114 and Fowler-Magerl, *Ordo iudiciorum* 1 n. 1: "Cum enim Adam de inobedientia argueretur a Domino, quasi actioni exceptionem obiciens relationem criminis in coniugem".

[33] See Fowler-Magerl, *Ordo iudiciorum* 7-8 on the twelfth-century jurists' understanding of the terms "prescriptio" and "exceptio".

[34] Stephen of Tournai to C.2 q.1 v. *an in manifestis*, printed by Fowler-Magerl, *Ordo iudiciorum* 27-28 n.76: "Videndum quod ordo iudiciarius dicitur, ut apud suum iudicem quid conveniatur, ut legitime vocetur ad causam tribus edictis vel uno peremptorio pro omnibus, ut vocato legitime prestentur inducie, ut accusatio sol-

> The defendant shall be summoned before his own judge and be legitimately called by three edicts or one peremptory edict. He must be permitted to have legitimate delays. The accusation must be formally presented in writing. Legitimate witnesses must be produced. A decision may be rendered only after someone has been convicted or confessed. The decision must be in writing.

This litany of admonitions indicates that by the second half of the twelfth century, the jurists were conscious of a defendant's right to a trial and of his right to have a trial conducted according to the rules of the *ordo iudiciarius*. Although the community played a much smaller role in a trial than before, the rules limited the authority of a judge to act arbitrarily[35]. The story of Adam and Eve's trial in Genesis provided a historical, theological, and judicial justification for Romano-canonical procedure.

At the very core of the modern conception of the right to due process is the idea that litigants have a right to have their case heard in court and that this right cannot be taken away. From the point of view of someone living in the twelfth century, the most disconcerting and distressing issue about the change from a mode of proof governed by the customs of the community to a court presided over by the prince or his delegate was uncertainty about how litigants could have their rights to a trial and due process recognized in the new procedural system.

A key issue became whether a person had a right to a trial. Twelfth-century jurists inherited a vague sense of a right to a trial from Roman law. The term, "actio," could mean the particular formulary of Roman procedure by which the plaintiff brought suit, the whole judicial proceedings, or, as a passage in Justinian's *Institutes* puts it, "the right of an individual to sue in a trial for what

lempniter et in scriptis fiat, ut testes legitimi producantur, ut nonnisi in convictum vel confessum feratur <sententia>; que sententia nonnisi in scriptis fieri debet, nisi sint breves lites et maxime vilium".

[35] The author of *Summa 'Elegantius in iure diuino seu Coloniensis'*, ed. G. Fransen (Monumenta Iuris Canonici, Series A, 1.2; Città del Vaticano 1978) 52, repeated Stephen's gloss.

is due to him"[36]. In this last sense "actio" meant "ius" or right[37]. This right was not yet fully developed and did not inhere in each human being. It could be taken away. As we shall see from the following discussion, the jurists wavered between justifying this right as an objective right of a subject to receive justice and as a subjective right of a subject to have his case fully heard in court[38]. Only after the jurists concluded that parts of the judicial process were protected by natural law did they clearly articulate a subjective, almost inalienable, right of a defendant to have his day in court.

Twelfth-century jurists tentatively raised the issue in various ways. Fowler-Magerl has described what she sees as a significant shift of emphasis in the judicial procedure of the twelfth century. In classical Roman law, litigants had very few rights to intervene in or to alter the pace of proceedings. The Romans considered the *ordo iudiciarius* an indispensable extension of public authority. Medieval jurists, she argues, saw it as a right of the litigants. In Roman law, the litigants could not object to a judge whom they considered partial, nor could they delay proceedings easily[39]. The medieval "ordines," on the other hand, granted litigants a range of devices with which they could control the tempo of a case. They could raise objections to the plaintiff, the judge, and the witnesses and thereby delay or stop the course of a trial[40].

Even though we do not have a proper history of twelfth-century

[36] Inst. 4.6 pr.: "Actio autem nihil aliud est quam ius persequendi iudicio quod sibi debetur".

[37] See B. Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Emory University Studies in Law and Religion, 5; Atlanta 1997), in which he has republished and recast a number of his earlier articles on rights.

[38] See Tierney, *The Idea of Natural Rights* 13-42 for an excellent discussion of the distinction between an objective right that is bestowed upon an individual by an external set of norms and a subjective right that inheres in each individual. Whether medieval jurisprudence recognized subjective rights or only objective rights is a question that is currently being debated. Tierney thinks that it did. R. Helmholz, *The Spirit of Classical Canon Law* (The Spirit of the Laws; Athens-London 1996) 305-308 also has a useful discussion of the problem and its implications, with citations to the most recent literature.

[39] The best account of procedure at the time of Justinian (the procedure the medieval jurists took as their model) is D. Simon, *Untersuchungen zum Justinianischen Zivilprozeß* (München 1969).

[40] Fowler-Magerl, *Ordo iudiciorum* 28; see also her remarks on p. 9, 13.

judicial procedure, Fowler-Magerl may well be right to see a sharp contrast between ancient and medieval practices. Most legal systems of any sophistication have some conception of "due process" in their procedure as well as at least the germ of the idea that a defendant has the right to be heard. The strictures of the Old Testament and Roman law required that a defendant be given an opportunity to defend himself in court[41].

Furthermore, we must not imagine that the early Middle Ages was bereft of any conception of this right just because no one ever expressed the idea in "The Age without Jurists". We find some evidence in twelfth-century literature that the right to a trial was not foreign to the world of the ordeal. A man (or a woman) had the right to prove his innocence. In the *Romance of Tristan,* after King Mark condemned Tristan and Isolt to death without a trial when they were caught in "flagrante delicto," the people of the Kingdom cried out: "King, you would do them too great a wrong if they were not first brought to trial. Afterwards put them to death"[42]. Although the people's plea might seem to be a simple cry for fair play, notorious crimes presented a key difficulty for jurists. They did not find it easy to justify a right to a trial for a defendant who had been caught in the act of committing the crime. King Mark, Tristan's judge, had seen the crime. Why was a trial necessary? The jurist struggled with that issue for a long time.

We know almost nothing about the norms governing judicial process in the early Middle Ages, but from the ninth century on there is substantial evidence that a defendant's right to a trial was an

[41] See the remarks of Fraher, "'Ut nullus describatur reus prius quam convincatur': Presumption of Innocence in Medieval Canon Law', edd. S. Kuttner and K. Pennington, *Proceedings of the Sixth International Congress of Medieval Canon Law, Berkeley* (MIC, Series C, 7; Città del Vaticano 1985) 494.

[42] Beroul, *The Romance of Tristan,* trans. A.S. Fedrick (Hammondsworth 1970) 67. For further bibliography see *The Prince and the Law* 145 n. 96; most recently W. Schild, 'Das Gottesurteil der Isolde: Zugleich eine Überlegung zum Verhältnis von Rechtsdenken und Dichtung', *Alles was Recht war: Rechtsliteratur und literarisches Recht. Festschrift für Ruth Schmidt-Weigand,* edd. Hans Höfinghoff, Werner Peters, Wolfgang Schild, and Timothy Sodman (Item Mediävistische Studien 3; Essen 1996) 55-76. Two other recent studies are John M. Bowers, 'Ordeals, Privacy and the *lais* of Marie de France', *Journal of Medieval and Renaissance Studies* 24 (1994) 1-32 and John W. Baldwin, 'The Crisis of the Ordeal: Literature, Law, and Religion around 1200', *Journal of Medieval and Renaissance Studies* 24 (1994) 327-353.

accepted norm[43]. In the twelfth century Gratian collected a number of texts in his Decretum (C.3 q.9), where he treated the question whether someone may be accused in absentia. A Pseudo-Isidorian text attributed to Pope Callistus expressed the general idea most precisely: "No one may sentence and no law may condemn someone who is absent"[44]. This chapter, included in a large number of collections from the eleventh and twelfth century, repeatedly reminded canonists that a defendant must be canonically summoned and publically convicted. In his famous decretal *Venerabilem*, Innocent III stated that if a defendant had not been cited, witnesses could not present testimony against him[45]. Consequently, the general principle that defendants must be summoned to court and given an opportunity to defend themselves was well established in customary and canon law before the rise of the *Ius commune*[46].

Defendants did not, however, have an absolute right to a trial before the thirteenth century. Early on the jurists attempted to draw distinctions between those crimes that required a trial and those that did not. For the canonists the *locus classicus* for this question was C.2 q.1 of Gratian's Decretum. Gratian included texts that permitted a judge to condemn someone without a trial if his crime was "manifest" or "notorious". Later canonists refined and altered these concepts. In the end, however, the jurists commonly agreed that under certain circumstances, usually when a crime was heinous and notorious, a judge could render a decision against a defendant without a trial[47].

The question was not just theoretical. It had already surfaced during the great conflict between Pope Gregory VII and the Emperor

[43] See the discussion in Fowler-Magerl, *Ordo iudiciorum* 14-19. J.S. Beckerman, 'Towards a Theory of Medieval Manorial Adjudication: The Nature of Communal Judgments in a System of Customary Law', *Law and History Review* 13 (1995) 1-22; on pp. 15-19 Beckerman discusses due process and on pp. 6-8, the rights of litigants.

[44] C.3 q.9 c.4: "quoniam absentem nullus addicit nec ulla lex dampnat". This chapter was included in almost every canonical collection from Burchard of Worms to Ivo of Chartres.

[45] X.1.6.34: "Si cognitoris absente altera partium videtur perperam processisse, cum citata non fuerit".

[46] E.g. X.2.20.2 and C.3 q.9.

[47] Fowler-Magerl, *Ordo iudiciorum* 13-28 treats this problem in juristic thought from the early Middle Ages to the twelfth century. See also Richard M. Fraher, "'Ut nullus describatur reus'" 493-506.

Henry IV. In 1076 at a Lenten Synod in Rome Pope Gregory VII excommunicated the German bishops who had taken part in the Synod at Worms. Gregory's summary action led to an exchange of letters between Bernoldus and Adelbertus of Constance and Bernhardus of Hildesheim[48]. Bernhardus insisted that Gregory did not have the right to excommunicate the bishops without a trial, conceding that if the bishops had been summoned, but refused to appear, their condemnation would have been justified[49]. Bernoldus insisted, however, that the pope could excommunicate criminals without a trial if their crimes were public and they were contumacious[50]. Petrus Crassus raised the same issue when he defended Henry IV in 1084. Citing texts from Roman and canon law, Petrus insisted that since Gregory had refused to hear the king's advocates and had condemned him *in absentia*, his sentence was not just[51].

In spite of objections, the pope's right to render a sentence without granting due process became well established. Hostiensis defended Pope Innocent IV's deposition of Frederick II at the First Council of Lyons in 1245 effortlessly. Notorious crimes, he concluded, particularly those committed against the Church, need no examination[52]. The papacy granted exceptions to the normal rules of

[48] Fowler-Magerl, *Ordo iudiciorum* 20-21.

[49] *Libelli de lite imperatorum et pontificum saeculis XI. et XII. conscripti* (MGH 2; Hannover 1892) 30: "Fecit quidem papa quod est apostolicum, dum damnavit quos dixeras publicos et contumaces aut confessos veraciter, aut convictos regulariter, aut si vocati canonice ad reddendae rationis iudicium venire noluerunt".

[50] Ibid.: "Iuxta hunc modum domnus apostolicus publicos et contumaces apostolicae sedis proscriptores satis canonice damnavit etiam absentes".

[51] *Libelli de lite imperatorum et pontificum saeculis XI. et XII. conscripti* (MGH 1; Hannover 1891) 446-47. See W. Stürner, *Peccatum und Potestas: Der Sündenfall und die Entstehung der herrscherlichen Gewalt im mittelalterlichen Staatsdenken* (Beiträge zur Geschichte und Quellenkunde des Mittelalters 11; Sigmaringen 1987) 125-26 with bibliography in n. 5.

[52] Hostiensis to X.1.6.34 v. *progenitores* and his *Summa*, de electione, X.1.6 Nedum in prelatis. The text is edited by J. Watt, 'Medieval Deposition Theory: A Neglected Canonist Consultatio', *Studies in Church History*, ed. G.J. Cumming (London 1965) II 207-210 at 210: "Set hec quomodo cum tantus princeps sic nec accusetur nec denuncietur nec citatus sit nec convictus; quod citatus fuerit, hoc certum est. Set esto quod non fuerit – quero quare si apostolus Corinthium absentem et irrequisitum contempnauit?... Certe, quia 'excessus notorius examinatione non indiget'... pater sanctissime considera quod idem est in eodem, scilicet excommunicatio publica, periurium manifestum ac persecutio diuulgata quam progenito-

due process for lesser crimes as well. By the beginning of the fourteenth century, ecclesiastical courts employed a shortened, summary procedure in cases that ranged from marriage to ecclesiastical benefices[53].

A primary reason why the jurists accepted the right of the prince to subvert the judicial process was that they considered legal procedure ("actiones") to be a part of the civil law, that is positive law, and, therefore, completely under the prince's legislative and administrative authority. Since the early twelfth century, the jurists had difficulty limiting the prerogatives of the prince that were established by the rules of positive law. For procedure a further difficulty lay in the mythological history of law that every law student had read at the beginning of Justinian's Digest. Two texts provided authoritative proof that "actiones" were a part of positive law. In one the Roman jurisconsult Papinianus had declared that the Praetorian law, the Roman law governing procedure, was a part of civil law[54]. In the other Pomponius, described the origins of the "actiones" in the early history of Rome at the time of the Twelve Tables: "the three laws were born, the laws of the Twelve Tables, and from these tables arose the civil law, and from them actions of law were composed"[55]. Consequently, by the early thirteenth century, the jurists unanimously agreed that the "actiones" were a part of the civil law. Accursius summed up their thought when he wrote in his Ordinary Gloss to the Digest that in contrast to contracts, "actiones" are derived from the civil law, as Pomponius had noted in his history incorporated into the Digest[56].

In the second half of the thirteenth century, the jurists

res eius et ipse presumpserunt in apostolicam sedem et in alias ecclesias exercere". At another place, Hostiensis suggested that the "voluntas" of the pope in matters that touched procedure was almost absolute, X.5.2.31 v. *voluimus* (Ed. 1581) fol. 21va.

[53] Clem.2.1.2 (Dispendiosam).

[54] D.1.1.7 (Ius autem civile est).

[55] D.1.2.2.6: "Deinde ex his legibus eodem tempore fere actiones compositae sunt, quibus inter se homines disceptarent... et ita in eodem paene tempore tria haec iura nata sunt: lege duodecim tabularum ex his fluere coepit ius civile, ex isdem legis actiones compositae sunt".

[56] Accursius to D.1.1.5 (Ex hoc iure gentium) v. *obligationes*, Munich, Staatsbibl. Clm 6201, fol. 4v: set actiones omnes sunt a iure civili, ut infra titulo i. l.ii. § Deinde (D.1.2.2.6)".

reconsidered the idea that the norms of the *ordo iudiciarius* were a part of man-made, positive law. Paradoxically, at a time when some historians have seen medieval conceptions of due process rapidly being eroded by the introduction of torture and by a fierce determination of ecclesiastical and secular magistrates to eradicate crime, the jurists rethought the origins of the judicial process. As they did defendants' rights became a central issue[57].

A small intellectual revolution had to take place, however, before the jurists could create a coherent argument that asserted the absolute right of litigants to a trial. They had to take the fundamental principles of the *ordo iudiciarius* out of the realm of positive law and place them in a system of law over which the human prince had no authority. Consequently, in the second half of the thirteenth century, the jurists gradually removed "actiones" from civil law and placed them in the law of nature. We do not know which jurist was the first to argue that "actiones" were derived from Roman civil law. Although the earlier "ordines" define what "actiones" were, they say nothing about from whence they came. Paucapalea's inspired argument that Genesis 3.12 proved that the *ordo iudiciarius* could be traced back to Eden must have prepared the jurists to think of it as an universal institution rather than solely the product of civil law. Finding the *ordo iudiciarius* in the Bible enabled jurists to attach divine sanction to it. Slowly, they began to argue that the judicial process was not established only by civil law, but by natural law or the law of nations as well. And, following the inexorable logic that flowed from that conclusion, they perceived that since the *ordo* was sanctioned by the law of nature, the prince could not violate its basic rules. Within a century of juristic dialogue in commentaries, glosses, and *consilia*, they begat an inviolable right to due process.

Before we look at this change in more detail, a word must be said about a number of interesting paradoxes in this story. The jurists created a new doctrine of rights for defendants at the same time that they were fitting the prince with resplendent, rhetorically dazzling metaphors exalting his authority. Their preoccupation with rights and with the rhetoric of monarchical power during the thirteenth century may, at first, seem puzzling and contrary to our expectations. In the modern world we are burdened with the illusion that only democratic

[57] Pennington, *Prince and the Law* 147-148 and notes.

societies are capable of defining and defending individual rights. Yet history can still surprise. A few observations may help to explain these developments. First, as we know from physics, every action has a reaction. The jurists seemed to have reacted against their own exaltation of princely power. As jurists became increasingly aware that all positive law resided in the will of the prince, they may have responded to a deeply felt conviction that a defendant's right to a trial should not be left solely to his arbitrary will. As we have seen, a right to a trial, even though not absolute, had been a norm for centuries. In the following pages we shall see that most jurists sought to bridle the prince's power to deny justice to his subjects. Strikingly, in a field in which unanimity was rare, very few jurists resisted this revolution of thought[58]. Second, rights were discussed extensively in the twelfth and thirteenth centuries. As Brian Tierney has demonstrated in great detail, twelfth and thirteenth-century jurists grappled with the idea of "rights" in many different areas of the law: marriage, elections, privileges, wills, and property[59]. Swept along by biblical justifications and a flood of "thinking about rights" the jurists radically redefined the origins of the *ordo iudiciarius*.

The jurists who first discussed this problem often referred to a gloss of Pope Innocent IV when they redefined the origins of "actiones". Indeed, although he does not quite meet the issue, Innocent was the first jurist to broach the question of whether the prince has an absolute right to take an action away from a subject[60]. Between 1246 and 1254, Innocent wrote his commentary on a decretal that Pope Innocent III had sent to Matthew, the bishop of Ceneda. Innocent III had informed Matthew that he was striking down the laws of Treviso and Conegliano permitting a layman who held a fief from an ecclesiastical institution to alienate it if he were needy[61]. Innocent IV began his commentary on the decretal with the observation that even if the cities' laws did not touch ecclesiastical persons and institutions, they would still be invalid because they

[58] See Pennington, *The Prince and the Law* 190-201.

[59] Tierney, *The Idea of Natural Rights*, chapters 1-3; See also Helmholz, *The Spirit of Classical Canon Law* 49-52; 155-156, 305-308, 372-373.

[60] At least I have not found earlier discussions that would anticipate his gloss.

[61] X.1.2.7, Po. 641, March 23, 1199. *Die Register Innocenz' III.*, II: 2. *Pontifikatsjahr: Texte,* ed. O. Hageneder, W. Maleczek, and A. Strnad (Rom-Wien: 1979) no. 7, p. 14.

injured the rights of a third party, the church holding the fief. Since the matter concerned dominion and obligations a third party held these rights from natural law. Unlike actions, observed Innocent, dominion and obligations, are not derived from civil law or the emperor[62]. No law or rescript was valid if it violated natural law, unless there was a just cause[63]. Up to this point Innocent repeated platitudes with which no one would have disagreed.

Innocent then asked a much more interesting question. What if the prince issued a rescript or statute that forbade a litigant from bringing a case to court? First he argued that if such a rescript or statute completely destroyed the right to bring suit it was not valid unless it had a "non obstante" clause, that is a clause that recognized the legal objections to the provision of the law, but overrode them[64]. The concept of "non obstante" was common to medieval legislative theory[65]. Innocent meant that such a general prohibition could not be licit unless the prince signified in his letter by using the "non obstante" clause that he knew his actions injured the rights of third parties. He concluded his argument with a statement of great originality[66]:

> But then some say that although it may be sustained that he takes an action away, nevertheless he cannot take away <the duty> that he render justice. This would be against natural law. If, indeed, the right is not taken away, but only postponed, <the law> is valid.

I do not know of other jurists who maintained that a prince could

[62] Innocent IV to X.1.2.7 v. *constituerunt* (Venice: 1495) unfol., Clm 6350, fol. 1vb, Clm 15704, fol. 1vb: "Super rebus etiam laicorum hoc statuere non possent cum tale statutum esset in lesionem iuris alterius et eius iuris quod ad aliquem spectat uel acquiritur de iure naturali, ut sunt dominia, obligationes, huiusmodi. Et non datur a iure civili uel ab imperatore ut actiones, uf ff. de iust. et iure Ex hoc (D.1.1.5), instit. de rerum diui. § Fere et § Preterea per illum (Instit. 2.1.12 and 20)".

[63] Ibid.: "Et dico non ualere legem uel rescriptum in preiudicium naturalis iuris nisi iusta causa interueniat".

[64] Ibid.: "Si ex eo perimatur ius omnino uel ex toto deneget agendi potestatem, non ualet nisi adiiciatur 'non obstante lege aliqua', ff. de lega. iii. Si quis, in principio. C. de testa. authen. Hoc inter liberos".

[65] See Pennington, *The Prince and the Law* 150.

[66] Innocent IV to X.1.2.7: "Sed et tunc ut quidam dicunt licet sustineatur quod auferat actionem tamen quin reddat iustitiam aufferre non posset, cum esset contra ius naturale. Si vero non auferatur ius, sed differatur, tenet".

not abolish the judicial process or an action because he was bound to render justice according to the tenets of natural law. Perhaps these were ideas circulating in the schools in the mid-thirteenth century. Whatever the case, from this time on the issue became an important one in juristic thought, and Innocent's brief comments provided a "pièce justificative" in establishing a right of due process for the next four centuries.

We will not follow the evolution of juristic thought here in detail but only indicate which jurists were most significant in changing the course of the jurisprudence of due process in the second half of the thirteenth century. No individual jurist rethought the juridical basis of due process; rather a number of them struggled with these issues during the next fifty years. It was not a development only within canonical jurisprudence. After Innocent IV, the civilians also discussed the issue intensively. The jurists created an intricate and fruitful dialectic that eventually resulted in the first clear statement of a defendant's right to a trial in the history of jurisprudence[67].

In the 1250's and 1260's, a number of jurists explored the question whether the prince could deny anyone a trial. Odofredus de Denariis discussed the prince's authority to deny his subject's right of an action in his commentary on Justinian's Code (1255-1264)[68]. He was inspired by a constitution of the Emperor Anastasius in which the emperor decreed that no rescript or pragmatic sanction should be observed if it seemed to prejudice any litigant[69]. Odofredus posed the question by contrasting the right that someone has to property with the right he has to an action[70]:

[67] For more detailed analysis, see Pennington, *The Prince and the Law* 150-164.

[68] Cortese, *La norma* I 131-41, seems to have been the first modern historian to have noticed this strand of juristic thought.

[69] C.1.22(25).6 (Omnes).

[70] Odofredus to C.1.22(25).6 (Omnes) Ed. Lyon: 1480, unfol. Vienna, National-bibl. Ink. 26.A.5, sine loco et anno (Hain –), fol. 52r-52v: "Audite: dominium mihi quesitum per traditionem mihi factam a domino, non habeo a principe, immo naturali ratione, et imperator non potest tollere naturalem rationem; set actionem habeo ab imperatore, i. a. l. ut ff. de origin. iur. l.ii. § Deinde (D.1.2.2.6), et imperator est lex animata in terris, ut in authen. de consul. et ideo quia dat actionem, potest tollere. Set dicet aliquis male dicis. Nonne rei uendicatio est ciuilis? Et sic aut imperator potest mihi tollere eam, et sic tollis mihi dominium rei mee, quia per eam uendicamus dominium, ut infra de rei uend. l. Doce (C.3.32.9), aut non potest tollere; et tu dixisti quia imperator potuit tollere actiones ciuiles si dicat 'non obstante tali lege'".

> I do not have dominion from the prince that I have acquired from my lord through "traditio" [a method of transfering property in Roman law], but from natural reason. The emperor cannot abolish natural reason. But I have <my right> to an action from the emperor... the emperor is "Lex animata"... and because he may grant an action, he can deny it. But some would say that you are arguing falsely [that is, the argument is wrong no matter which position is adopted]. Is not the vindication of a thing ["vindicatio rei" is a technical term of Roman law that means asserting one's right to something] a matter of civil law? Consequently, either the emperor may deny my action, and you can take my dominion away from me, because we defend our rights through an action... or he may not. You have argued that the emperor may take a civil action away if he states "non obstante tali lege".

After having posed the question whether the emperor can take away dominion by denying an action, Odofredus dealt with this problem in three different ways. First he pointed out that sometimes one could claim ownership of a thing without an action[71]. But with this observation, he begged the question of a right to an action. Then he went to the heart of the matter. The emperor can, he argued, deny an action for the recovery of a right that is derived from the civil or pretorian law. When, however, the right is based on the law of nations, the emperor cannot[72]. And thirdly, he continued, one might argue that the emperor cannot take my dominion over a thing away; therefore he cannot take the consequences of that dominion away, that is the right to bring an action to recover it. He conceded that the prince could take "any other personal action away if he had a just cause"[73].

[71] Ibid.: "Ad quod respondeo duobus modis: Et uno modo sic. Dominium rei mee non potest mihi auferre imperator, set rei uendicationem sic. Si dicis non possum rem meam petere ab alio nisi per rei uendicationem, respondeo non. Si tu es dominus, aliter potes habere rem tuam, quia si cadat a possessione alter, et tu nanciscaris possessionem, retinebis eam per retentionem quia multa retinemus per retentionem que, etc. ut ff. de cond. indeb. l. Si in area".

[72] Ibid. "Vel possum dicere secundo modo quod imperator non potest tollere mihi rei uendicationem, quia per hoc tolleret mihi dominium rei mee. Et hoc uerum est cum res mea est apud alium constituta, quia cum quid prohibetur et id per quod peruenitur ad illud etc. ut ff. de sponsa. l. Oratione; quod enim supra dictum est: intelligo cum actio ciuilis competit mihi pro his que non sunt iurisgentium, set pro his que sunt quesita iure ciuili uel pretorio".

[73] Ibid. "Vel dicatis tertio modo, sicut imperator non potest auferre dominium rei mee, nec sequelam dominii, scilicet rei uindicationis, set aliam personalem actio-

Another civilian, Guido of Suzzara, picked up some of the threads in Odofredus' *Commentary*. Like Odofredus, he focused on the connection between a right protected by natural law and a person's right to pursue his case in court. In his *Suppletiones* to the Justinian's *Code* Guido noted that the emperor cannot take away an action depriving a person of ownership. If the emperor, he went on, could take away a legitimate action with a rescript, then he would remove the impediment of civil law that someone cannot go to law without an action[74]. The implicit point of Guido's gloss is that the emperor cannot confiscate private property by preventing a subject from bringing suit because the subject's right would still exist and could be presumably vindicated, whether he were granted an action or not.

Guido broached the question in his glosses on the *Digest*. He asked if the podestà of a city were asked to enforce a municipal law depriving someone of their castle or some other right without any cause, would the podestà be bound to uphold this statute since he had sworn to uphold all the statutes of the city? His first point was succinct[75]:

nem bene potest mihi auferre uel ex causa iusta uel dic si diceret 'non obstante tali lege'". See the remarks of Cortese, *La norma* I 133-34.

[74] Guido of Suzzara, *Suppletiones* to C.1.19(22).2 (Quotiens), Paris, B.N. lat. 4489, fol. 34r: "Infra eodem, in glossa ad finem: Vel dic quod actionem mihi competentem imperator non potest tollere per rescriptum, nam sic per consequens posset mihi auferre dominium rei mee, quod tamen falsum est. Et cum aliquid prohibetur, et omne id, etc. ut ff. de spon. l. Oratio (D.23.1.15) et leg. sum. rei fu. et alien. ne prosti. l. finali (?) Item quod non refert quid equipollentibus fiat, ut ff. si certum pet. l. Certum est (D.12.1.6) uel si dicatur quod imperator possit mihi tollere per rescriptum actionem mihi competentem, que est de iure ciuili, remouebitur impedimentum quod ius ciuile posuit, scilicet quod aliquis sine actione non potest experiri, ut ff. de negot. gest. Si pupilli (D.3.5.5(6)) et de admin. tu. l. Quotiens § Si temporali (D.26.7.9(10).2) ut et alias aliquis sine actione experitur, ut infra de contrahend. et commit. stip. l. Nuda (C.8.37(38).5) et ff. de uerb. oblig. l. Si citius. (D.45.1.?) G.".

[75] Guido of Suzzara, *Suppletiones* to D.1.1.9 (Omnes populi), Clm 6201, fol. 5v: "Item quero si statutum sit in ciuitate de castro alicuius uel de alia re sine causa occupando, <et> potestas iurauit generaliter seruare omnia statuta, teneturne istud statutum seruare? Planum est quod statutum non ualet, nam etiam princeps, nisi iusta causa subesset, non debet mihi rem meam auferre, immo nec ius meum, puta actionem, ut C. de prec. imperat. offic. l. Quotiens (C.1.19(22).2) et l. Rescripta (C.1.19(22).7) de diuer. rescipt. l. finali (C.1.23(26).7) infra de constit. prin. l.i. in fine (D.1.4.1) immo officialibus principis a priuatis potest resisti si contra ius rem meam uellent auferre, ut C. de iure fisc. l. Prohibitum et l. Facultas, lib. x. (C.10.1.5 and 7)".

> It is plain that the statute is not valid, for even the prince should not take my property away, unless there is just cause, and not my right, such as an action... rather the officials of the prince can be resisted by the people if they attempt to confiscate my property.

Although Guido did not explicitly argue that an action was protected by natural law, that conclusion is almost inevitable from his argument. An annotator to his text in the Parisian manuscript with the initial "E" (Egidius?) understood the thrust of his argument. "Guido's opinion is true if actions are derived from the law of nations," he commented[76]. Guido had slightly changed the terms of the argument. He no longer reminded his readers that actions were established by civil law. He equated the rights of ownership and of due process. If the right to own property was based on natural law, then the right to defend that property must also be grounded in natural law. Therefore, the prince may not take either right away.

The jurists after Guido quickly made the connection that Odofredus and Guido anticipated. An anonymous glossator of the Digest may have been the first to write that actions are derived from the law of nations. He commented on a law that stated if a person's property was confiscated, he could direct someone to buy the property; if the person did not buy it for him or if he would not relinquish it to him, an action on mandate (a gratuitous contract in Roman law) lies[77]. His argument was ingenious[78]:

> Note that one may argue from this paragraph that actions are derived from the law of nations. This may be proven thus: a person who is sent into exile loses everything according to civil law, and yet he does not lose his

[76] Paris, B.N. lat. 4489, fol. 34r: "et hec oppinio maxime uera est si dicas actiones esse de iure gentium, quod dic ut dixi, ff. de orig. iur. l.ii. Deinde ex hiis (D.1.2.2.6) e.". Paris 4489 abounds with additiones to Guido's text, most signed e.

[77] D.17.1.22.5 (Si tibi mandavero).

[78] D.17.1.22.5 v. *His cuius bona*, Clm 6201, fol. 261r: "Not. arg. ex isto § quod actiones sunt de iure gentium, quod sit probatum, nam deportatio facit omnia amittere que sunt de iure ciuili, et cum hic iste fuit deportatus, et a[d]mittat actiones, igitur dicamus quod sint de iure gentium". The gloss went on to present a counter argument: "Hoc reprobant doctores et intelligunt istum § quod non fuit hic facta deportatio, set intelligunt quando fuit facta publice tantum mouentur ex lege ex hoc iure gentium, supra de iust. et iure, licet hic glo. eum indistincte intelligat in deportato". Paleographically the text of this gloss is contemporary to the layer of Guido of Suzzara's glosses in the same manuscript.

> right to an action. Therefore we may say that actions are derived from the law of nations.

He stretched the meaning of the text in the Digest considerably when he assumed that the person being dispossessed will be exiled, but his argument is, nonetheless, clever. Significantly, he did not specify whether all actions are derived from the law of nations or only those actions based on the law of contract. Although he most likely believed the latter, from his gloss one could assume that he would have placed all actions under the law of nations[79].

Jacobus de Arena was the student of Guido of Suzzara, taught at Bologna, Padua and Toulouse, and died ca. 1296. Guido directly influenced his thought on the origins of actions. By the end of the thirteenth century, the jurists were writing long commentaries on the fourth book of Justinian's Institutes in which actions were treated. Jacobus drew out all the implications of Guido's comments on contracts and actions. His gloss is the first extended argument that certain actions are based on the law of nations, and it is worth quoting in its entirety[80]:

[79] Sergio Bertelli's objection to the use of "law of nations" to translate "ius gentium," betrays his insecure knowledge of English (*Rivista storica italiana* 107 [1995] 878) and of the meaning of the Latin word "gens" in the ancient, medieval, and early modern world. One has two choices in English: "Law of nations" or "Law of peoples." If understood in the modern senses of "nation" and "people," neither captures exactly the meaning of what the jurists meant by "ius gentium," Translation is always a compromise. For further discussion of the term see the excellent article by B. Nicholas, 'Ius gentium', *The Oxford Classical Dictionary*, edd. S. Hornblower and A. Spawforth (Oxford 1996[3]) 790.

[80] Jacobus de Arena to *Institutes* 4.6, "Lectura super titulo De actionibus" in *Super iure civili* (Lyon 1541) fol. 262r: "Quero quo iure inducte sunt actiones? Doctores dicunt quod de iure civili, nam lex dicit ex his legibus composite sunt actiones, ff. de orig. iur. l.ii. § Deinde ex hiis, et leges sunt de iure civili, ut dicto §. Dominus meus dicit quod exemplo quocumque iuris obligatio inducitur, et Accursius dicit quod quedam sunt obligationes pretorie seu civiles, unde et actiones sunt civiles vel pretorie, quoniam illas actiones quas iurisgentium ignoravit non potuit inducere iusgentium, immo sunt de iure civili et pretorio. Set ille actiones que descendunt ex contractibus iure gentium, ille actiones sunt de iure gentium, et propter hoc obligationes sunt de iuregentium, ut ff. de iust. et iure l. Ex hoc iure. Set absurdum fuerit in iuregentium si homines erunt obligati et non poterunt exigi. Ergo pro nihilo erant obligationes. Vnde ut evitetur istud inconveniens, et actiones erant tunc temporis". See Cortese, *La norma* I 132 n. 86.

> I ask by what law are actions established? The doctors say that they come from civil law, for the law states that actions are constructed from these laws... and these laws are derived from civil law... My teacher <Guido of Suzzara> argued that contracts are established by all legal systems, and Accursius stated that there are certain obligations that are pretorian or civil, hence actions are also either civil or pretorian. Of course, those actions that the law of nations does not recognize, it could not establish. Certainly these <actions> are civil or pretorian. But those actions that arise from contracts of the law of nations are established by the law of nations. And because of this, obligations are a part of the law of nations. It would be absurd if men were bound <by contracts> according the law of nations and could not bring suit, for then contracts would be useless. Consequently, in order to avoid this difficulty, there were actions then <when men were ruled by the law of nations>.

Like Guido Jacobus maintained that contracts were found in all legal systems; therefore actions vindicating contracts must precede the civil law. The idea was becoming a commonplace.

At the end of the thirteenth century the jurists moved, slowly, towards the realization that in cases involving contracts a defendant had a fundamental right to a hearing and to a defense[81]. Since this right was founded on a higher law, the prince could not unilaterally deprive a subject of it. Although these ideas did not immediately sweep the field – one can find examples of jurists steadfastly maintaining that actions were a part of civil law – they did become firmly entrenched in the literature.

The most sophisticated and complete summing up of juristic thinking about due process in the late thirteenth and early fourteenth centuries is found in the work of Johannes Monachus. He was a French canonist, who studied in Paris, became bishop of Meaux and an advisor to Philip the Fair. He died in 1313[82]. While glossing a "decretalis extravagans" of Boniface VIII (Rem non novam) he commented extensively on the rights of a defendant[83]. He began by

[81] To pharaphrase the wording of the United States Supreme Court, *Ballard v. Hunter*, 204 U.S. 241, 27 Sup. Ct. 261, 51 L. Ed. 461.

[82] H.P. Glöckner, 'Johannes Monachus', *Dictionary of the Middle Ages* 7 (1986) 120-121.

[83] On the collection of *extravagantes* that Johannes glossed and other similar collections, see Jacqueline Tarrant, *Extrauagantes Iohannis XXII* (MIC, Series B, 6; Città del Vaticano 1983) 1-21. For Johannes's glosses to the extravagantes see R.M. Johannessen, 'Cardinal Jean Lemoine and the Authorship of the Glosses to

asking the question: could the pope, on the basis of this decretal, proceed against a person if he had not cited him? Johannes concluded that the pope was only above positive law, not natural law. Since a summons had been established by natural law, the pope could not omit it[84]. He argued that no judge, even the pope, could come to a just decision unless the defendant was present in court[85]. When a crime is notorious, the judge may proceed in a summary fashion in some parts of the process, but the summons and judgment must be preserved[86]. A summons to court (citatio) and a judgment (sententia) were integral parts of the judicial process because Genesis 3.12 proved that both

Unam sanctam', *Bulletin of Medieval Canon Law* 18 (1988) 33-41.

[84] Johannes Monachus to Extravag. com. 2.3.1 (Rem non novam) v. *Non obstantibus aliquibus privilegiis*, London, B.L. Royal 10.E.i., fol. 214r, London, Lambeth Palace 13, fol. 363v-364r: "Ad euidentiam premissorum quero an papa procedere contra aliquem ualeat citatione non premissa? Et uidetur quod sic quia est supra ius, extra. de conces. preb. Proposuit (X.3.8.4). Item quia princeps solutus est legibus, ff. de legibus et senatuscon. Princeps (D.1.3.31(30)). Item papa habet plenitudinem potestatis, ii. q.vi. Decreto (C.2 q.6 c.11), extra. de pen. et rem. Cum ex eo, in fine (X.5.38.14), extra. de usu pal. Ad honorem (X.1.8.4). Sed contra. Citatio est principium processus iudiciarii ut supra not. et habetur extra. de probat. Quoniam contra (X.2.19.11), et ad finem iudiciorum que est sententia, ff. de re iud. l.i. (D.42.1.1) attingi sine principio non potest... Nullus potest supra ius quod non condidit, sed conditum presupponit. Sed papa uel purus homo nullum dictorum iurium condidit, sed alias conditum presupponit, xxv. q.i. Sunt quidam (C.25 q.1 c.6), igitur supra nullum illorum potest. Maior patet, minor etiam manifesta est quantum ad legem eternam, uel ius eternum, diuinum, naturale, et quantum ad ius humanum quod deriuatur a naturali... sequitur ergo conclusio, scilicet, quod papa non potest nisi supra ius quinto modo dictum, scilicet supra ius pure positiuum".

[85] Ibid.: "Restat igitur uidere si citatio sit de iure naturali uel de humano deriuato a naturali ut conclusio ex principio: quia si papa circa talia iura nihil possit ut ex precedentibus patet, consequens est quod contra nullum possit procedere citatione non premissa... Cum igitur non potest ad plenum factum et iustum uel iniustum sine presentia eius qui iudicari debet cognosci et sciri, xxx. q.v. § His ita, in fine (C.30 q.5 p.c.9), extra. de re iud. Cum Bertholdus (X.2.27.18), xi. q.iii. Eorum (C.11 q.3 c.76). Tunc necesse est ipsum citari et uocari; nec papa hoc potest omittere, et minus alius iudex, quia sic omitteretur cognitio que ad iudicium de necessitate requiritur... Et sic patet secundum et tertium simul, scilicet quod citatio est de iure naturali et per consequens quod papa contra aliquem procedere non potest nisi citatione premissa".

[86] Ibid.: "Et hoc probat hec constitutio euidenter. Hoc liquet etiam in notoriis in quibus licet iuris ordo non sit seruandus usquequaque, seruandus in citando et in sententiando, extra. de iureiur. Ad nostram (X.2.24.21), ii. q.i. Imprimis (C.2 q.1 c.7), extra. de diuort. Porro (X.4.19.3), ii. q.i. Manifesta (C.2 q.1 c.15), not. extra. de accus. Qualiter, ibi, 'Descendam' (X.5.1.24)".

were necessary[87]. Johannes referred to the history of the judicial process first told by Paucapalea and Stephen of Tournai and given final form by Guilielmus Durantis in the Prologue of his *Speculum iudiciale*[88]. Even God was bound to summon Adam to render a defense[89]. Perhaps drawing on the conclusion of the anonymous French jurist cited above or persuaded by the inner logic of God's judgment of Adam and Eve, Johannes took medieval conceptions of due process one step further: Everyone is presumed innocent unless they are proven culpable; the law is more inclined to absolve than to condemn[90]. Guilielmus Durantis stretched this norm to its ultimate extreme: even the devil should have his case heard in court[91]. An argument might be made that the pope or some other judge could know the truth about a case from secret sources, but Johannes did not think that this objection was valid. A judge is not a private person and does not judge as one. He is a public person, and he should learn the truth publically[92]. Although the prince's will has the force of law if it is regulated by reason, his will is not, according to Aristotle, "a secure rule". When the prince judges without discussion and examination of a case, his will is not informed by reason[93]. Finally, he

[87] Ibid: "Et Gen. xviii. (Genesis 18.21-33) ubi factum erat notorium attamen Deus uoluit probare quam iudicare... Nec obstat extra. de accus. c. Euidentia (X.5.1.9), nec ibi tollitur citatio nec sententia quia Gen. iii. probatur utrumque necessarium".

[88] On Guilielmus Durantis, see Pennington, *The Prince and the Law* 162-164.

[89] Proemium, *Speculum iuris* (Basel 1574) 5: "Hinc est quod iudiciorum ordo et placitandi usus in paradiso videtur exordium habuisse. Nam Adam de inobedientia a Domino redargutus, quisi actori exceptionem obiiciens, relationem criminis in coniugem, immo in coniugis actorem convertit, dicens: Mulier quam mihi sociam dedisti me decepit".

[90] Johannes Monachus to Extrav. Com. 2.3.1: "Item quilibet presumitur innocens nisi probetur nocens, extra. de presum. c. Dudum (X.2.23.16), extra. de scrut. in ord. fac. c. unico (X.1.12.1), ff. de manumis. test. l. Seruos (D.40.4.20) et ius est promptius ad absoluendum quam ad condemnandum".

[91] *Speculum iuris* (Basel 1574) III de inquisitione § Vltimo (p. 42): "Et si proprium non habeat, abbas non privabit eum defensione, quae excommunicato, et etiam diabolo, si in iudicio adesset, non negaretur".

[92] Johannes Monachus to Extrav. Com. 2.3.1.: "Sed forte dices quod papa uel alius iudex nouit causam et ueritatem negotii secreto, ut est priuata persona. Dicendum est quod hoc non sufficit quia iudex non iudicat ut priuata persona, sed ut publica et ideo publice debet sibi innotescere ueritas, scilicet per leges publicas, diuinas, uel humanas in communi".

[93] Ibid.: "Ad tertium dicendum est quod uoluntas principis legis habet uigorem, si

cited Aristotle again. There are two types of principalities: despotic and politic. The first is similar to the relations between a slave and his master. The slave has no right to resist. The second is a polity of free men, who have the right of resistance. A free polity governs the Church; it is not a despotism[94].

Johannes's gloss is a remarkable defense of due process in law. As we have seen, nothing in his gloss is without its antecedents, but no jurist before him had written such a thorough analysis of a defendant's right to a public and proper trial. His long commentary on *Rem non novam* was incorporated into the *Ius commune* and was read by thousands of jurists during the next three centuries.

3. *Due Process and the Political Events of the Late Middle Ages*

Two great events of the late Middle Ages raised issues of due process: the dispute between Robert of Naples and the Emperor Henry VII in the fourteenth century and the Pazzi Conspiracy in the fifteenth[95]. The first marked a stage when the norms of the *Ius commune* began to be accepted and defended. The second reveals the mature evolution of the jurisprudence of due process. At first a number of jurists exempted the pope, if not the emperor, from the limitations of due process[96]. By the time of the Pazzi Conspiracy in 1478, the jurists had realized that if God must obey the rules of procedure, the pope must do the same.

The struggle between Henry and Robert is an event of the first

sit ratione regulata, et fiat animo condendi legem cuius forma traditur C. de leg. Humanum (C.1.14(17).8), quia uoluntas de se non est securus canon, ut Philosophus dicit ii. Polit. Cum autem princeps iudicat uel sententiat sine cause discussione et examinatione non habet uoluntatem regulatam secundum rectum iudicium rationis".

[94] Ibid.: "Ad quartum dicendum est quod secundum Philosophum in i. Polit. duplex est principatus, despoticus et politicus. Primus est domini ad seruum qui non habet ius resistendi, eo quod seruus est domini totaliter secundum quod huiusmodi. Secundus est principatus liberorum, qui habent ius in aliquo resistendi, et talis est principatus ecclesie circa subditos. Non enim est uerisimile quod principatus ecclesie sit despoticus. Non enim sumus ancille filii, sed libere, qua libertate Christus non liberauit, ad Galat. iv. Joh. Monac. Cardinalis".

[95] This section is based on chapters five and six of Pennington, *The Prince and the Law*.

[96] See Pennington, *The Prince and the Law* 191-201.

rank in legal history. It generated a significant amount of polemical literature, most of it in the form of *consilia*, and also produced papal and imperial legislation that dealt with the issues of imperial jurisdiction, the relationship between the church and the state, and the rules governing the judicial process. The dispute is a splendid example of politics' challenging, shaping, and using legal theory; it is also an illustration of how rapidly the issues generated by political controversies could become common coin in the law schools. Henry's chancery produced *Ad reprimendum* and *Quoniam nuper est*. Pope Clement V issued three constitutions: 1. *Pastoralis cura*[97] issued at Carpentras, March, 1314 on the same day as *Romani principes*[98] in which he reacted directly to *Ad reprimendum*; 2. *Romani principes* argued for Henry's duty to observe the oaths that he had sworn to the pope[99]; and, a little later, 3. *Saepe* in which he clarified the rules of judicial procedure that had arisen over the meaning of the Latin clause, "simpliciter et de plano, ac sine strepitu et figura iudicii" (simply and plainly, without clamor and the <normal> forms of procedure). This phrase had been used in Henry's letters condemning Robert and was a common fixture of papal letters to judges-delegate in certain cases[100]. The legislation had a long-lasting influence. Stephan Kuttner has called *Saepe* "the most important single piece of

[97] Clem.2.11.2.

[98] See the text printed by W. Dönniges, *Acta Henrici VII. imperatoris Romanorum et monumenta quaedam alia Medii Aevi*, Vol. 2 (Berlin 1839) 241-243.

[99] Clem.2.9.1.

[100] Clem.5.11.2. Stephan Kuttner dates the text between 6 May, 1312 and 21 March, 1314, "probably closer to the later date," in 'The Date of the Constitution "Saepe": The Vatican Manuscripts and the Roman Edition of the Clementines', *Mélanges Eugène Tisserant* (Studi e Testi 234, Città del Vaticano 1964) 427-452 at p. 432; reprinted in *Medieval Councils, Decretals, and Collections of Canon Law* (Collected Studies Series, London 1980). Robert van Answaarden has suggested that the phrase "de plano" should be translated "on the floor" or "extrajudicially", meaning that the judge was not required to be seated on the bench (*Journal of Modern History* 69 [1997] 813). Neither translation makes any sense in English, especially "extrajudicially", which would indicate an event outside the judicial process. More importantly his interpretation contradicts the words of *Saepe contingit* (Clem.5.11.2), in which Clement V states clearly exactly what this phrase means. Clement did non state that a trial held "simpliciter et de plano" meant that a judge did not preside over the court proceedings but that he could dispense with certain parts of procedure and cut short delays caused by advocates who exploited the normal procedural rules with the intention of prolonging the trial.

medieval legislation in the history of summary judicial procedure"[101]. *Pastoralis cura* became a *locus classicus* in medieval law for discussing the rules of judicial procedure and the main piece of legislation for confirming and transmitting the principles of due process developed by the thirteenth-century jurists to later generations.

The jurists played an unprecedented role in the final outcome of the dispute. They wrote *consilia* for Henry VII and for Robert. The pope became involved and called upon his jurists to defend Robert. The key issue that the jurists grappled with was whether Henry had extended Robert due process of law. A theoretical limitation of the prince's authority in the writings of the jurists had been transformed into a weapon to put a bridle on Henry's arbitrary and summary condemnation of Robert.

Even after Henry's death, Clement V still felt compelled to answer the legal challenge posed by Henry's legislation and his condemnation of Robert. His first step was to ask one of the most distinguished jurists at Avignon, Oldradus de Ponte, to write a *consilium* discussing the legal issues involved in the affair[102].

In his *consilium* Oldradus broached the question of what constituted proper judicial procedure by posing a series of questions about the legitimacy of Henry's summons of Robert to his court. Is a summons invalid to a place where a defendant has notorious enemies? If so, is a subsequent trial and judgment also invalid[103]?

[101] 'The Date of the Constitution "Saepe"', 427. On the doctrine of summary judicial procedure, see Charles Lefebvre, 'Les origines romaines de la procedure sommaire aux XII et XIII s.', *Ephemerides iuris canonici* 12 (1956) 149-197.

[102] On Oldradus see T. Schmidt, 'Die Konsilien des Oldrado da Ponte als Geschichtsquelle', *Consilia im späten Mittelalter: Zum historischen Aussagewert einer Quellengattung*, ed. Ingrid Baumgärtner (Studi: Studienreihe des Deutschen Studienzentrums in Venedig, 13; Sigmaringen 1995) 53-64. I had thought that Oldradus might have died after 1343, not ca. 1335 as most reference works state, until I realized how tenuous the connection between Consilium 333 and the manuscript tradition of Oldradus' consilia. See B. McManus, 'The *Consilia* and *Quaestiones* of Oldradus de Ponte', *Bulletin of Medieval Canon Law* 23 (1999), in which he discusses the authenticity of 333 and issues recently raised by Schmidt and G. Montagu, 'Roman Law and the Emperor – The Rationale of "Written Reason" in some Consilia of Oldradus de Ponte', *History of Political Thought* 15 (1994) 1-56.

[103] (Rome 1472) (unfoliated) (nr. 43), Clm 3638, fol. 26r-27r (43), Clm 5463, fol. 43r-44r (nr. 81, olim 87): "Queritur utrum citatio facta in loco ubi communiter ha-

Oldradus argued that there were two kinds of summons, the "execution of intent" and the manner through which the summons is brought[104]. The execution of intent is the defendant's knowledge of the summons and his ability to defend himself. This cannot be omitted[105]. Oldradus argued that just as the right of self-defense is granted to everyone in extrajudicial matters by natural law, so too in court a person has the right to defend himself by natural law[106]. There can be no defense without knowledge. If the prince would render a judgment without all necessary knowledge, he would take a defense away from a man that is granted by natural law. This, concluded Oldradus, the prince may not do[107]. A summons is the means by which knowledge is brought to the court[108]. Natural law does not establish the method through which a summons is delivered, that is by a nuncio, letter, or edict. The means are regulated by

bitant inimici notorii citati absente longe ipso citato ex hoc reddatur nulla, et per consequens processus et sententia subsecuta".

[104] Ibid.: "Pro examinatione eorum de quibus queritur primo illud puto uidendum utrum citatio, si sit de esse iudicii ita quod pretermissa per principem sententiam nullam reddat et potissime criminalem? Circa quod dicendum uidetur quod in citatione consideratur duo, scilicet effectus intentus et ad ipsum perueniendi modus".

[105] Ibid.: "Effectus intentus est scientia citati et facultas defendendi. Et hoc non uidetur posse obmitti quin ueniat uere uel interpretatiue, ut in c. Nos in quemquam (C. q.1 c.1)".

[106] Ibid.: "Sicut enim iure nature permissa est unicuique defensio contra extraiudicialem uiolentiam, ut ff. de iust. et iur. l. Vt uim (D.1.1.3) et ad leg. Aquil. l. Scientiam § Qui cum aliter (D.9.2.45(46).4) Adeoque in brutis uidet huius permissio, ut ff. si quad. paup. fec. dicatur l.i. § Cum arietes (D.9.1.1.11), sic et aduersus uiolentiam iudicialem, ut ff. de iniuriis l. Nec magistratibus (D.47.10.32) extra de rest. spol. Conquerente (X.2.13.7) et ff. ad leg. Aquil. l. Quemadmodum § Magistratus (D.9.2.29.7) et C. de iure fisci l. Facultas et l. Prohibitum (C.10.1.7 et 5) Verum quia omnis licitus defendendi modus debet commensurari modo offendendi qui intenditur, ut C. unde ui l. Si quis in tantam (C.8.4.7) et C. de iureiur. l.i. (C.2.58(59).1) et ibi not. Idcirco in iudicialibus licet iure nature cuilibet se defendere iudicialiter, non iniuriis et obprobriis, ut C. de postul. l. Quisquis (C.2.6.6)".

[107] Ibid.: "sed quia defensio sine scientia esse non potest, necessaria est omnino scientia uera uel interpretiua, et cum princeps hac non precedente iudicat, subtrahit homini defensionem iure nature concessam. Set hoc non potest princeps, ut inst. de iure nat. gen. et ciu. § Set naturalia (Inst. 1.2.11) et not. Compos. in c.p. Sicut extra de elect. <et not.– elect. om. Clm 3638> ergo etc.".

[108] Ibid.: "Modus autem inducendi hanc scientiam uere uel interpretiue est citatio, et ideo cum inchoatur modus offendendi, statim datur possibilitas defendendi per citationem, et hoc est quod textus dicit `omnium autem actionum instituendarum principium ab ea parte edicti proficiscitur quam pretor edicit de in ius uocandi'".

positive law, and the prince can, therefore, summon anyone as he wishes[109].

Oldradus did not create a new and fresh doctrine defending the rights of litigants but drew upon the legal tradition that we have already discussed. *Pastoralis cura* was probably drafted after Oldradus composed this *consilium*, and its doctrine ikely was taken from it[110]. With the promulgation of *Pastoralis cura* the doctrines of the jurists were inserted into the law of Christendom. It served as a beacon for the rights of due process during the rest of the Middle Ages.

A little over 150 years later these issues were raised again in the dramatic events surrounding the murder of Giuliano de' Medici. The drama continued after Giuliano's death. The aftershocks were severe. The protagonists were worthy foes. On the one side stood the pope, Sixtus IV, the spiritual leader of Christendom and temporal prince of Central Italy; on the other, Lorenzo, first citizen of Florence.

In the early nineteenth century, Lorenzo Pignotti mentioned a number of jurists who wrote *consilia* defending Lorenzo de' Medici from the papal excommunication levied on him after the Pazzi Conspiracy. Historians have explored the intense acrimony between Lorenzo and the pope as a political problem, but few have explored the legal aspects of the controversy[111]. The *consilia* are of great importance for issues that we have been following. They discuss the authority of the prince, the necessity of due process, and the prince's relationship to the law. They recapitulate juristic thought at the end

[109] Ibid.: "Set citationes habent suos modos quia aliquando per nuncium et aliquando per epistolas et aliquando per edicta... et est quidam modus citationum in ipsarum iteratione consistens... et ad hunc modum non uidetur princeps artari, arg. expressum ff. de manu. l. Apud eum (D.40.1.14) quia isti non sunt modi de iure nature, set de iure simpliciter positiuo cui princeps non est necessario alligatus, ut ff. de leg. et sent. consul. l. Princeps (D.1.3.31(30)) et C. eodem titulo l. Digna (C.1.14(17).4)".

[110] For more detail about the dispute and the jurists' role in it, see *The Prince and the Law* 183-201.

[111] *Storia della Toscana* (Firenze 1826) VIII 132-33, note 18. There is surprisingly little literature on the conspiracy in modern times. The most detailed accounts, discussed in part below, are dated. See the bibliography in the edition of Angelo Poliziano, *Della congiura dei Pazzi* (*Coniurationis commentarium*), ed. by A. Perosa (Padova 1958) and F. Morandini, 'Il conflitto tra Lorenzo il Magnifico e Sisto IV dopo la congiura dei Pazzi: Dal carteggio di Lorenzo con Girolamo Morelli, ambasciatore fiorentino a Milano', *Archivio storico italiano* 107 (1949) 113-154.

of fifteenth century.

Lorenzo himself had no doubts about the injustice of Pope Sixtus IV's actions after he had escaped the assassins' knives. On 19 June 1478, he wrote to René of Anjou[112]:

> I know that the only crime I have committed against the pope is, and God is my witness, that I live and that I did not suffer death... On our side we have canon law, on our side we have natural and political law, on our side we have truth and innocence, on our side God and mankind.

Sixtus's bull of 1 June, 1478 had condemned Lorenzo as a son of iniquity and a rebel against the Church. Sixtus used the new printing press to give his bull the wide circulation[113]. The Signoria of Florence responded to Sixtus's letter on 21 July, in an apologia probably written by Bartolomeo Scala[114]. They rejected Sixtus' allegation that

[112] Historians had thought that this letter was sent to King Louis XI of France. This misattribution has occurred even after Nicolai Rubinstein published his edition of the letter (cf. Harold Acton, *The Pazzi Conspiracy: The Plot Against the Medici* [London 1979] 99). Lorenzo de' Medici, *Lettere*, 3: 1478-1479, ed. by N. Rubinstein (Firenze 1977) 72-74: "Ego enim mihi sum conscius, Deus autem testis adest, nihil me commisisse contra pontificem nisi quod vivam, quod me interfici non sim passus, quod omnipotentis Dei gratia me protexit; hoc meum est peccatum, hoc scelus, ob hoc unum exterminari excommunicarique sum meritus. Deum tamen optimum cordium scrutatorem iustissimum iudicem, meae innocentiae testem minime permissurum credo, ut quem illemet inter suas aras et sacra, ante sui corporis sacramentum a sacrilegis illis nos ab hac etiam iniustissima calumnia defensum velit. Nobiscum faciunt canonicae leges, nobiscum ius naturale et politicum, nobiscum veritas et innocentia, nobiscum Deus atque homines sunt".

[113] The bulls excommunicating Lorenzo and placing Florence under interdict were printed, presumably in Rome, by G. Bonattus. Listed by Hain as *14816. Angelo Fabroni, *Adnotationes et monumenta ad Laurentii Medicis magnifici vitam pertinentia* (2 Vols. Pisa 1784) 2.121-129, printed Iniquitatis filius. Rinaldi and Mansi also have printed the letters. Contemporaries noted the popes use of the new technology; see A. Brown, *Bartolomeo Scala, 1430-1497, Chancellor of Florence: The Humanist as Bureaucrat* (Princeton, N.J. 1979) 159, n. 68, citing a letter of L. Botta: "perchè non sequendo pace, me pare essere certo ch'el pontefice con le consuete justificationi sue le faria mettere in stampa et le mandaria ad sua justificatione ad tutti li potentati christiani". Rubinstein, *Lettere* 48-49, notes that original copies of the bull and its printing are very rare. He draws attention to a copy in the Bibliothèque nationale, Paris and a copy of Hain *14816 in Munich, Staatsbibliothek (correct signature is 4° Inc. s.a. 1672a). A. Sorbelli, 'La scomunica di Lorenzo de' Medici in un raro incunabulo romano', *L'Archiginnasio* 31 (1937) 331-35.

[114] Brown, *Bartolomeo Scala* 85-87, discusses this letter and Scala's authorship

Lorenzo was a tyrant. The pope had the authority, they observed, to wage war against the Turks, but to wage war against a Christian ruler was quite another matter[115]. Both Sixtus' original bull and the Signoria's response to it were pieces of propaganda aimed at a larger public[116].

Lorenzo and his advisors must have been aware that they needed more than propaganda to discredit Sixtus' excommunication and interdict, and a number of jurists were called upon to defend Lorenzo[117]. They quickly responded with detailed rebuttals and provided Lorenzo with a formidable defense. By the end of July, 1478 he had already received tightly argued and lengthy *consilia*.

Fabroni and Pignotti wrote that seven jurists "and others" wrote in defense of Lorenzo[118]. Four long *consilia* comprising 21 folios in the printed editions are known to have been written. Each *consilium* contains extensive discussions of the political and the legal ramifications of the Pazzi Conspiracy. Two appear among the *consilia* printed with those of Franciscus Curtius Papiensis[119]. The first was written by Bartolomeo Sozzini (Socinus) (1436-1507). Poliziano mentioned this *consilium* in a letter written to Lorenzo on 24 August, 1478, and, consequently, it must have been written before this date[120]. The second was signed by the doctors of Florence representing the entire college of doctors (undoubtedly the doctors of law)[121].

of it.

[115] Pignotti, *Storia della Toscana* VIII 220-25. Sixtus' bull is also printed by Mansi, Rainaldi, and Baluze, *Miscell.* vol. 1.

[116] E. Frantz, *Sixtus IV. und die Republik Florenz* (Regensburg 1880) 225-229, partially prints the letter of the Signoria and discusses it.

[117] The most famous defense of Lorenzo was by the humanist, Angelo Poliziano, first printed in the fifteenth century: *Angeli Politiani coniurationis Commentarium*, printed without a date or a place, listed by Hain as *13240. Also edited by A. Perosa (Padova 1958).

[118] Fabroni, *Adnotationes* I 81 and Pignotti, *Storia della Toscana* VIII 133 n. 18 also lists Lancilloto, Bolgarino, Andrea Panormita, and Pier Antonio Cornio as having written consilia. Perhaps they participated in writing the consilium of the College of the Doctors of law.

[119] Printed as Consilia 20 and 21 (Milano 1496).

[120] Fabroni, *Adnotationes et monumenta* 2.183: "Per costui vi mando e consigli di Messer Bartolommeo Sozzini. Holli sollecitati a ogni hora et trovato li scriptori; et elli ancora vi ha usata diligentia somma. Ma non si è potuto far più presto". Cf. Brown, *Bartolomeo Scala* 158, n. 65.

[121] Franciscus Curtius Papiensis, *Consilia* (Milano 1496) [Hain *5871], no. 21 (unfoliated): "Et ita salva semper determinatione sancte matris ecclesie iuris esse

Francesco Accolti wrote a defense of Lorenzo that is published among his *consilia*, written while he was teaching at Siena. In November 1478, he complained that the legate of the Duke of Calabria had petitioned that the magistrates of Siena take him captive. Francesco believed that it was because he had written the *consilium* for Lorenzo. He was undoubtedly right. Some of the language in his *consilium* was intemperate. Fortunately, he wrote, the request was not granted[122]. Shortly afterwards, in the Spring of 1479 he began teaching at Pisa[123]. Finally, the Florentines asked a noted jurist of the time who has since sunk into obscurity, Girolamo Torti (Hieronimus de Tortis) to write a *consilium*. He had been educated at Pavia, Ferrara, and Bologna, taught at Pavia for 32 years, and died in 1484. His *consilium* was published separately in a slim *folio* volume[124].

When Lorenzo wrote to René of Anjou in the middle of June, he must have known about the main arguments that could be made in his defense. The rhetorical flourish of his elegantly cadenced litany – that canon law, natural law, and God supported him – should not obscure the essential truth of his statement[125]. All the *consilia* make the same argument: two centuries of Romano-canonical procedural law supported Lorenzo, and these procedural rules were not just a part of positive canon law but were based on a higher law, natural law. Each jurist made the same fundamental point: even the prince's "potestas absoluta" could not subvert the judicial process. They established that when Sixtus condemned Lorenzo, he had violated procedural rules to which even the pope must adhere. There was no longer any doubt that the supreme prince of Christendom was bound by the procedural rules of *Pastoralis*. The pope was hoist to his own

putamus, nos doctores Floren. prius inter nos communicato consilio representantes totum collegium doctorum Floren., et in fidem premissorum solito sigilo collegii nostri sigillari fecimus".

[122] Fabroni, *Adnotationes* 2.135-36.

[123] 'Accolti, Francesco', *Dizionario biografico degli Italiani* 1 (Rome 1960) 104-105.

[124] One of the incunabula does not have a place or a date, Hain *15579; the other was published at Pavia in 1485, Hain *15580. It was also printed in the sixteenth century by Vincentius de Portonariis after the consilia of Antonio de Butrio (Lyon 1534) and (Lyon 1554).

[125] Rubinstein, *Lettere* 72-74 writes little about the contents of the letter and nothing about the author. Poliziano was working in the chancery and may have been responsible for it.

petard[126].

The jurists' defense of Lorenzo de' Medici provides a fitting ending to the story we have been telling. By the end of the fifteenth century, Lorenzo's dramatic rhetoric in his letter to René of Anjou was more than just rhetoric. Law was staunchly on his side. Lorenzo had a strong legal defense, and he, or his advisors, commissioned prominent jurists to write *consilia* for Lorenzo and the Florentine state. In their *consilia*, the lawyers summarized two centuries of juristic thought about the relationship of the prince and the law. Their task was not daunting. The commentaries of the jurists on the decretal *Pastoralis* had created a sophisticated doctrine of "due process" that Pope Sixtus violated when he condemned Lorenzo without a hearing. A defendant's right to present his case in court had become so embedded in juristic thought that even the prince's absolute power could not dislodge it.

The writings of these jurists transmitted the jurisprudence of due process into the early modern period. Due process of law became part of the intellectual baggage of every jurist who studied the *Ius commune*, and natural law continued to be the sturdy foundations upon which key elements of judicial procedure rested. Bartolomé de Las Casas, Jean Bodin, Samuel Pufendorf, Johannes Althusius, and Benedict Carpzov incorporated these norms of procedure created by the medieval jurists into their works[127].

One of the great writers on procedure of the late sixteenth and early seventeenth century, Prospero Farinacci, rehearsed these norms often in his works[128]. He believed that the rights of defendants rested on the law of nature and, consequently, that the prince could not take their right to a trial away[129]. He even extended defendants' rights

[126] These consilia are discussed in detail in Pennington, *The Prince and the Law* 244-268.

[127] Pennington, *The Prince and the Law* 272-275. K.W. Nörr, *Naturrecht und Zivilprozeß: Studien zur Geschichte des deutschen Zivilprozeß während der Naturrechtsperiode bis zum beginnenden 19. Jahrhundert* (Tübingener Rechtswissenschaftliche Abhandlungen 41; Tübingen 1976) is the best history of these developments in early modern jurisprudence.

[128] N. Del Re, 'Farinacci, giureconsulto romano (1544-1618)', *Archivio della Società romana di storia patria* 98 (1975) 135-220. A. Mazzacane, 'Farinacci, Prospero', *Dizionario biografico degli italiani* 45 (1995) 1-5.

[129] E.g. Prospero Farinacci, (Prosperus Farinacius), *Praxis et theoricae criminalis libri duo in quinque titulos distributi* (Frankfurt 1606) 143-144, num. 15: "Et

beyond the trial. A judge, he argued, must hear exculpatory evidence after he had rendered a verdict and free an innocent person, even if the defendant were at the gallows[130]. Farinacci had been accused of serious crimes several times during a career that took him from ducal to papal courts, from prison to the palace of the papal governor of Rome. We can imagine that his reputation for corruption and extortion may have made him particularly sensitive to the rights of defendants. As Guilielmus Durantis had proclaimed three centuries earlier, even the devil himself must be given his day in court and the right to defend himself.

One last observation about the story that we have told. We cannot know how well the rights of defendants were protected in the "Age without Jurists". No one, however, could have predicted that placing the judicial process in the hands of the prince would have resulted in a system of norms that protected the rights of defendants absolutely. We have seen that the jurists of the *Ius commune* were the key ingredient in developing a conception of due process for medieval judicial procedure. It is food for thought that Great Britain, a country that prides itself on its adherence to the principles of due process and in whose courts the community has never lost its place, did not establish the absolute right of defendants to defend themselves in court until the seventeenth and eighteenth centuries, long after these principles had become fundamental to the jurisprudence of the *Ius commune*[131]. The key difference between the development of

si tu subtilis diceres, ergo Princeps isto casu tollit exceptionem et defensionem innocentiae? Quae tamen cum sit de iure naturae, nec a principe, nec a statuto tolli potest, secundum Baldum".

[130] Ibid., p. 146, num. 20: "Adverte sexto quod si iudici constat <post sententiam>, condemnatum non esse delinquentem, et sic de eius innocentia, tunc sicut non posset ipsum, non obstante quacumque contumacia, condemnare, ita pariter, nec contra eum condemnatum poterit suam sententiam exsequi, sed liberum et absolutum dimittere tenetur, consulto tamen principe et non alias... Et hoc nullam habet difficultatem, quia etiam quod condemnatus esset in furca, si iudici superveniat probatio innocentiae, debet supersedere, nec sententiam exsequi, et non licet iudici innocentem occidere".

[131] For an outline of the disabilities suffered by English defendants in civil and criminal cases before the eighteenth and nineteenth centuries, see Theodore F.T. Plucknett, *A Concise History of the Common Law* (Boston 1956[5]) 424-441. Leonard MacNally, *The Rules of Evidence on Pleas of the Crown* (London-Dublin 1802) pointed out in the early nineteenth century that some English rules of procedure still violated the norms that we have been discussing, p. 33: "If these English

continental and English jurisprudence of procedure may be that, although England was a land of liberal, constitutional government, for centuries it was also a "Land without jurists".

statutes <on the necessity of two witnesses in cases of treason> were enacted because in cases of treason the oath of allegiance counterpoises the information of a single witness, is not an Irishman intitled(*sic*) to the benefit of that reason? – or, if the principal reason for enacting those statutes was, as Sir William Blackstone states, 'To secure the subject from being sacrificed to fictitious conspiracies which have been the engines of profligate and crafty politicians in all ages,' why should not Irishmen be granted the same security, from such conspiracies and the machinations of such politicians? The imperial parliament have to discuss and determine those questions at a future day".